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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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CLERK US DISTRICT COURT DISTRICT OF NEVADA	
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JASON ERIC SONNTAG

Plaintiff,

v.

KENNETH GURRES, ET AL.

Defendants.

3:09-cv-00637-ECR-VPC

REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE

December 14, 2010

11 This Report and Recommendation is made to the Honorable Edward C. Reed, Jr., Senior
12 United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant
13 to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is defendants' motion to dismiss (#26).¹
14 Plaintiff opposed (#36), and defendants replied (#42). The court has thoroughly reviewed the record
15 and recommends that defendants' motion to dismiss (#26) be denied.

16 **I. HISTORY & PROCEDURAL BACKGROUND**

17 Plaintiff Jason Sonntag ("plaintiff"), a *pro se* inmate, is currently incarcerated at Northern
18 Nevada Correctional Center ("NNCC") in the custody of the Nevada Department of Corrections
19 ("NDOC") (#12). Plaintiff brought his original action pursuant to 42 U.S.C. § 1983, alleging that
20 prison officials used excessive force against him and failed to protect him in violation of the
21 Eighth Amendment.² *Id.* Specifically, plaintiff alleges that defendants Gurres and Carroll brutally
22 attacked him on October 17, 2009, while other defendants assisted in or approved of, ordered, or
23 covered up evidence of the attack. *Id.*

24 Defendants filed a motion to dismiss plaintiff's complaint for failure to exhaust his

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¹ Refers to the court's docket numbers.

² Plaintiff's Eighth Amendment claims are the only remaining claims after screening of his complaint pursuant to 28 U.S.C. § 1915A (#11).

1 administrative remedies pursuant to the Prison Litigation Reform Act ("PLRA") and Administrative
 2 Regulation ("AR") 740 (#26). Defendants claim that plaintiff did not file any grievances regarding
 3 the incident on October 17, 2009. *Id.* at 3. Defendants support this conclusion by noting that
 4 plaintiff answered "no" to the following question on his civil rights complaint form: "Have you
 5 attempted to resolve the dispute stated in this action by seeking relief from the proper administrative
 6 officials, e.g., have you exhausted available administrative grievance procedures?" (#12, p. 11). The
 7 question goes on to state: "If your answer is 'No', [sic] did you not attempt administrative relief
 8 because the dispute involved the validity of a: (1) disciplinary hearing; (2) state or federal court
 9 decision; (3) state or federal law or regulation; (4) parole board decision; or (5) other." *Id.* Plaintiff
 10 checked "state or federal law or regulation" and provided the following note: "This is a civil rights
 11 suit."³ *Id.*

12 Plaintiff explains that he participated in a disciplinary hearing on October 24, 2009, during
 13 which he went "into great detail about the head bashing, macing and assault and battery" (#36, p. 3).
 14 He argues further that he "immediately grieved the [hearing] and the assault." *Id.* To support this
 15 assertion, plaintiff attaches grievance records to his opposition and states that "[a]ll 3 grievances
 16 [were] filed and denied." *Id.* at 4. Specifically, plaintiff attaches informal grievance number
 17 20062886354, dated November 10, 2009, and signed by the grievance coordinator on November 13,
 18 2009. *Id.* at 9. The informal grievance is stamped "received" on November 10, 2009; however,
 19 plaintiff did not provide the court a version of the form that includes NDOC's response. *Id.* The
 20 informal grievance details plaintiff's hearing difficulties, which he claims prevented him from fully
 21 participating in the disciplinary proceeding. *Id.* at 14. Among other details included in the
 22 grievance, plaintiff states: "this also constitutes my grievance against C.O. Carroll, Gurries, and
 23

24 ³ The court notes that "when it is clear from the face of the complaint that a prisoner did not
 25 exhaust the administrative remedies, then the court must dismiss the action pursuant to 28 U.S.C. § 1915A."
 26 *Valenzuela v. Skolnik*, 2010 WL 4286164 (D. Nev. Oct. 21, 2010) (citing *Bennett v. King*, 293 F.3d 1096,
 27 1098 (9th Cir. 2002)). However, plaintiff's claims were not dismissed during screening and the court did
 28 not address the issue of exhaustion at that time (#11). Based upon plaintiff's response to the second portion
 of the question, the court is unsure whether plaintiff understood the question. Further, plaintiff now provides
 documentation of his efforts to satisfy all three levels of the prison grievance system. Therefore, the court
 is not convinced that plaintiff's response to these questions demonstrates knowledge that he did not exhaust
 his remedies prior to filing his complaint.

1 Kelly for assault and battery.” *Id.* at 17. Plaintiff also attaches the first and second level grievances
 2 for log number 20062886354, both of which were denied. *Id.* at 30, 32.

3 In their reply, defendants concede that plaintiff filed a grievance related to a disciplinary
 4 hearing that occurred on November 5, 2009; however, they state that this “grievance does not grieve
 5 the alleged use of force” (#42, p. 3). Defendants attach to their motion the inmate issue history
 6 detailing NDOC’s record of grievance number 20062886354 (#26-3, p. 3). The inmate issue history
 7 includes entries for first and second level grievances, but notably does not include a record of an
 8 informal grievance. *Id.* In fact, defendants do not address plaintiff’s informal grievance in their
 9 briefing. The inmate issue history reflects that NDOC received the first level grievance on
 10 November 12, 2009, and provided an official response on January 20, 2010. *Id.* NDOC received
 11 the second level grievance on February 3, 2010, and provided an official response on February 17,
 12 2010. *Id.* Defendants’ final argument is that even if the grievance of the disciplinary hearing could
 13 be “construed to address the alleged use of force, it was not filed until November 10, 2009, making
 14 it untimely” (#42, p. 3).

15 The court notes that the plaintiff is proceeding *pro se*. “In civil rights cases where the
 16 plaintiff appears *pro se*, the court must construe the pleadings liberally and must afford plaintiff the
 17 benefit of any doubt.” *Karim-Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 623 (9th Cir.
 18 1988); *see also Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

19 II. DISCUSSION & ANALYSIS

20 A. Discussion

21 Failure to exhaust is an affirmative defense under the PLRA rather than a jurisdictional
 22 requirement, and defendants bear the burden of raising and proving that the plaintiff has not
 23 exhausted. *Jones v. Bock*, 549 U.S. 199, 216 (2007); *Wyatt v. Terhune*, 315 F.3d 1108, 1117 n.9 (9th
 24 Cir. 2003), *cert denied*, 540 U.S. 810 (2003). Inmates are not required to specifically plead or
 25 demonstrate exhaustion in their complaints, rather, it is the defendant’s responsibility to raise the
 26 issue in a responsive pleading. *Jones*, 549 U.S. at 216.

27 Failure to exhaust is treated as a matter in abatement, not going to the merits of the claim,
 28 and is properly raised in an unenumerated Rule 12(b) motion. *Wyatt*, 315 F.3d at 1119. The court

1 may look beyond the pleadings and decide disputed issues of fact without converting the motion into
 2 one for summary judgment; however, “if the district court concludes that the prisoner has not
 3 exhausted nonjudicial remedies, the proper remedy is dismissal of the claim without prejudice.” *Id.*
 4 at 1119-20, as noted in *O’ Guinn v. Lovelock Corr. Ctr.*, 502 F.3d 1056, 1059 (9th Cir. 2007); see
 5 also, *Rizta v. Int’l Longshoremen’s & Warehousemen’s Union*, 837 F.2d 365 (9th Cir. 1988)
 6 (“[F]ailure to exhaust nonjudicial remedies should be raised in a motion to dismiss, or be treated as
 7 such if raised in a motion for summary judgment.”).

8 1. **Prison Litigation Reform Act of 1996**

9 The PLRA amended 42 U.S.C. § 1997e to provide that “[n]o action shall be brought with
 10 respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner
 11 confined in any jail, prison, or other correctional facility until such administrative remedies as are
 12 available are exhausted.” 42 U.S.C. § 1997e(a).

13 Although once within the discretion of the district court, the exhaustion of administrative
 14 remedies is now mandatory. *Booth v. C.O. Churner*, 532 U.S. 731 (2001). Those remedies “need
 15 not meet federal standards, nor must they be ‘plain, speedy, and effective.’” *Porter v. Nussle*, 534
 16 U.S. 516, 524 (2002), citing *Booth*, 532 U.S. at 739-40 n.5. Even when the prisoner seeks remedies
 17 not available in the administrative proceedings, notably money damages, exhaustion is still required
 18 prior to filing suit. *Booth*, 532 U.S. at 741. Recent case law demonstrates that the Supreme Court
 19 has strictly construed section 1997e(a). *Id.* at 741 n.6 (“We will not read futility or other exceptions
 20 into statutory exhaustion requirements where Congress has provided otherwise”).

21 Plaintiffs must properly exhaust nonjudicial remedies as a precondition to bringing suit. The
 22 PLRA requires “proper exhaustion,” meaning that the prisoner must use “all steps the agency holds
 23 out, and doing so *properly* (so that the agency addresses the merits).” *Woodford v. Ngo*, 548 U.S.
 24 81, 89 (2006). Requiring exhaustion prior to filing suit furthers the congressional objectives of the
 25 PLRA as set forth in *Porter v. Nussle*, 534 U.S. 516, 524-25. See *id.* at 1200.

26 2. **NDOC Procedures**

27 “Applicable procedural rules [for proper exhaustion] are defined not by the PLRA, but by
 28 the prison grievance process itself.” *Jones*, 549 U.S. at 218.

1 The NDOC grievance procedure is governed by AR 740 (#26-2). Defendants attach to their
2 motion the relevant version of AR 740, which was in effect at the time plaintiff filed his grievance
3 (#26, p. 2 n.2). In order for plaintiff to exhaust available remedies at the time of his injury, AR 740
4 required the following: (1) an informal review level, which “shall be reviewed and responded to by
5 the inmate assigned caseworker” in consultation with other appropriate staff; (2) a first level formal
6 grievance, which “shall be reviewed and responded to by the Warden;” and (3) a second level
7 grievance, which “shall be reviewed and responded to by either the Assistant Director of Operations,
8 Assistant Director of Support Services, Offender Management Administrator, Medical Director, or
9 Correctional Programs Administrator” (#26-2, p. 11).

10 NDOC encourages inmates to resolve grievances informally. *Id.* at 14. Informal grievances
11 must be filed within one of two time frames, depending on the nature of the grievance.

12 If the issue involves personal property damage or loss, personal injury, medical
13 claims or any other tort claims, including civil rights claims, within six (6) calendar
14 months.

14 If the issue involves any other issues within the authority and control of the
15 Department, including, but not limited to, classification, disciplinary, mail and
16 correspondence, and food, within ten (10) days.

16 *Id.*

17 Once received, NDOC logs informal grievances into a tracking system. *Id.* The caseworker
18 assigned to the grievance will provide the inmate with a response within twenty-five days, unless
19 more time is required to conduct further investigation. *Id.* at 15. For cases in which an inmate
20 alleges staff misconduct, the case is forwarded to the Office of the Inspector General for review and
21 the informal grievance response reflects this action. *Id.* If the inmate is not satisfied by NDOC’s
22 response to his informal grievance, he may appeal the decision within five days by filing a first level
23 grievance. *Id.* at 16-17. NDOC will provide a response within twenty days of receipt of the first
24 level grievance. *Id.* at 17. Finally, if the inmate is not satisfied with the first level grievance
25 outcome, he may file a second level grievance, to which the NDOC will respond within twenty days.
26 *Id.* at 17-19. Upon completion of the grievance process, inmates may pursue civil rights litigation
27 in federal court.

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1 **B. Analysis**

2 Defendants argue that plaintiff failed to exhaust his administrative remedies with respect to
 3 all claims (#26). Specifically, defendants assert that plaintiff did not ever file a grievance about the
 4 alleged use of force by the defendants. *Id.* at 3. They further explain that even if the grievance
 5 plaintiff filed about the related disciplinary hearing could be construed as a grievance of the assault,
 6 it was not timely because it was filed on November 10, 2009, twenty-four days after the incident
 7 (#42, p. 3). Plaintiff argues that he properly exhausted his administrative remedies by filing
 8 informal, first, and second level grievances, all of which were denied (#36, p. 4).

9 The court reviewed the informal grievance plaintiff attached to his opposition and notes that
 10 the grievance includes six pages of detail related to a disciplinary hearing, the underlying incident
 11 giving rise to the hearing and plaintiff's claims of excessive force, and plaintiff's medical condition.
 12 Plaintiff identifies the grievance as an "appeal of disciplinary hearing" in line one of the grievance
 13 statement; however, he also states on page five of the additional detail that "this also constitutes my
 14 grievance against C.O. Carroll, Gurries, and Kelly for assault and battery." Therefore, the court is
 15 not convinced by defendants' statement that plaintiff's grievance solely appeals the disciplinary
 16 hearing, as plaintiff clearly states that he also intended to grieve the alleged excessive force.⁴ As a
 17 result of this conclusion, the court applies the six-month time frame outlined in AR 740 as applicable
 18 to "issues involv[ing] . . . personal injury, medical claims or any other tort claims, including civil
 19 rights claims." Applying this time frame, plaintiff's grievance of the alleged excessive force was
 20 timely, as he appears to have filed the informal grievance only twenty-four days after the incident,
 21 which is well within the allowable six-month time frame.

22 It is unclear from parties' briefing and attachments how plaintiff's informal grievance was
 23 resolved. The informal grievance provided by plaintiff is stamped "received" on November 10,
 24

25 ⁴ The court declines to speculate about whether NDOC allows inmates to grieve multiple
 26 issues on one grievance form since defendants do not raise this concern, nor do they suggest that plaintiff's
 27 grievance suffered from this particular procedural deficiency. Similarly, the court notes that plaintiff's
 28 informal and formal grievances appear to have been received by NDOC on the same day or only one day
 apart. Again, however, defendants do not raise this issue as an example of a procedural deficiency in their
 briefing, attachments, or responses to plaintiff's first and second level grievances. Therefore, the court is
 unwilling to assume this is the cause of plaintiff's failure to exhaust.

2009, and the grievance coordinator signed the form indicating its receipt on November 13, 2009. However, the informal grievance is not included in the NOTIS report provided by defendants, nor does plaintiff provide a copy of the informal grievance that includes NDOC's response. What is evident from parties' exhibits is that plaintiff successfully filed a first level grievance, attaching the same six pages of detail he claims to have attached to his informal level grievance. NDOC denied this grievance and plaintiff subsequently filed a second level grievance, which was also denied. Plaintiff also includes a memorandum from Warden Benedetti regarding the appeal of his disciplinary hearing stating that "[b]ased on [plaintiff's] claim of excessive force, this matter will be forwarded on for further review in accordance with AR70." While the outcome of this supplemental investigation is not relevant to the instant issue, the court notes this exhibit merely to suggest that plaintiff appears to have raised the issue of excessive force in the appeal process.⁵

Based on the facts before the court, defendants have not met their burden of proving that plaintiff has not exhausted his remedies. Plaintiff provides copies of his grievances, which include complaints about excessive force. While the court is unclear as to how NDOC resolved the informal level grievance, the court declines to assume on defendants' behalf that plaintiff's informal grievance was procedurally infirm. The court is particularly reluctant to draw this conclusion as NDOC addressed first and second level grievances, which included details about the alleged assault, without noting any procedural deficiencies in the informal grievance. Therefore, defendants' motion to dismiss plaintiff's claims for failure to exhaust is denied.

III. CONCLUSION

Based on the foregoing and for good cause appearing, the court concludes that defendants did not meet their burden of proving that plaintiff failed to exhaust his administrative remedies. Therefore, the court recommends that summary judgment for the defendants be **DENIED**. The parties are advised:

1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice,

⁵ It is unclear from the briefing and attachments whether the appeal process referenced in the memorandum is part of the grievance process, as plaintiff and NDOC both refer to plaintiff's grievance as an "appeal."

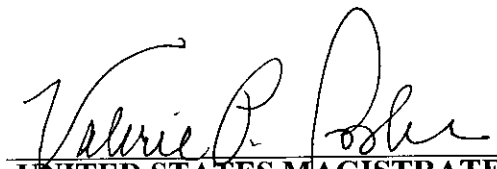
1 the parties may file specific written objections to this report and recommendation within fourteen
2 days of receipt. These objections should be entitled "Objections to Magistrate Judge's Report and
3 Recommendation" and should be accompanied by points and authorities for consideration by the
4 District Court.

5 2. This report and recommendation is not an appealable order and any notice of appeal
6 pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's judgment.

7 **IV. RECOMMENDATION**

8 **IT IS THEREFORE RECOMMENDED** that defendants' motion to dismiss (#26) be
9 **DENIED.**

10 **DATED:** December 14, 2010.

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12 **UNITED STATES MAGISTRATE JUDGE**
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